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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 636

ABRAHAM TEITELBAUM,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ABRAHAM TEITELBAUM, Petitioner,
Attorney pro se,
100 North La Salle Street,
Chicago, Illinois.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Abraham Teitelbaum, acting as attorney *pro se*, petitioner, prays that a writ of certiorari issue to review the judgment entered in this case on August 24, 1961 by the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the Tax Court of the United States and to which opinion a dissenting opinion has been made reversing in part the Tax Court decision. The Petition for Rehearing was denied on October 3, 1961.

OPINIONS BELOW.

The findings of fact and Opinion of the Tax Court are reported in C.C.H. December, 24,031 (M)T.C. memo 1960-11. The Opinion of the Court of Appeals is printed in Appendix "A," reported in 294 F(2d) 541.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 24, 1961. Petition for Rehearing was denied on October 3, 1961. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code, Appendix "B."

QUESTIONS PRESENTED.

1. Can the Commissioner of Internal Revenue levy an income tax against a person without first examining the available books and records of a taxpayer, in absence of an emergency for a jeopardy assessment?

2. Can such an assessment stand without giving the taxpayer the usual and customary opportunities to review such a tax at the various levels for review in the Internal Revenue Department?

3. Section 58 I.R.C. is in contravention of the United States Constitution and is therefore unconstitutional.

4. The penalties under Sec. 294 I.R.C. are unconstitutional.

5. The application of the 16th Amendment to the Constitution of the United States as to special treatment and the persecution of Petitioner is unwarranted, illegal and confiscatory; and is therefore unconstitutional.

STATUTES INVOLVED.

This case directly concerns the application of the entire Internal Revenue Code as enacted under the 16th Amendment to the Constitution of the United States as to:

1. The levying of a tax based upon no examination of the available books and records of the petitioner taxpayer.

2. Power to destroy a taxpayer under the guise of collecting an income tax.

3. Denial of due process of law to a taxpayer.

4. Denial of the Equal Protection clause under the Constitution of the United States.

5. The penalties provision for failure to file an estimate for taxes is unconstitutional.

STATEMENT OF THE CASE.

Commissioner of Internal Revenue levied taxes and penalties for failure to file estimated taxes against Petitioner for the years 1949-1951, inclusive, without first examining the available books and records of petitioner. The proof of this is undisputed because thereafter the Internal Revenue Department sent taxpayer forms to extend the Statute of Limitations for those years to first examine such records.

One of the Honorable Judges of the United States Court of Appeals for the 7th Circuit filed his dissenting opinion in part to the ruling of the Circuit Court as set forth in the Appendix "A," 294 F. 2d 541.

On January 21, 1953, Petitioner was indicted for failure to pay income taxes for the years 1946 and 1947 (Tr. pp. 127-145 incl.) which he had paid in full on October 3, 1952.

In 1955, Petitioner was again indicted for income tax violation of Sec. 145(b) of 26 U.S.C.A. for the years 1950 and 1951, because of his refusal to plead guilty to the first indictment (Tr. p. 203).

Petitioner was found guilty in the first case, and Honorable J. Samuel Perry, Judge of the U. S. District Court, suspended the imposition of any sentence. Due to lack of funds to defend the second indictment, Petitioner was obliged to plead *nollo contendere*, and the Court entered a twelve-month suspended sentence, and granted probation.

The District Attorney then filed his petition to disbar Petitioner from the practice of law in the Federal Court, and the three U. S. District Court Judges, comprising the Honorables Igoe, La Buy, and Sullivan, commissioned Judge Sullivan as the Chief Justice to hear and determine the disciplinary proceedings. Citing *In Re Teitelbaum*, 253 F. (2d) 1.

The petition for disbarment was denied, and the District Attorney who was the designee to become an Associate Judge of the U. S. Court of Appeals for the Seventh Circuit at that time, decided to appeal said decision to review the District Court's action. *In re Teitelbaum*, 253 F. (2d) 1.

The Court of Appeals dismissed said appeal, and the Opinion filed therein is important to a proper termination of this cause. Citing: *In re Teitelbaum*, 253 F. 2d 1.

On May 21, 1958, the Supreme Court of Illinois suspended Petitioner from the practice of law for three years, even though the Federal Courts held heretofore that the same facts did not warrant any discipline. Citing: *In re Teitelbaum*, 13 Ill. 2d 586.

The Honorable J. Samuel Perry, Judge of the United States District Court, in commenting on the evidence in the first indictment said:

> "There is something to be said on behalf of the Defendant in this matter, and that is this, that the

Defendant has *not concealed one dollar total gross income* from the United States, according to the records, as I have found them.

"The total amount of money that he has received, that passed through his hands, has been correctly reflected." (Pet.'s Ex. 53 CR. 36.) (253 Fed. 2nd 1)

The Bill of Particulars in the first indictment states that there does not appear to be any income tax now due and owing from Abraham Teitelbaum. The amounts charged are the amounts due and owning from the Tyted Co. (Pet'r Ex. 53 CR 36.) (Joint Exhibit 3c)

The District Director in his letter stated that, "The Tyted Co. was a naked trust, and all taxes that could have been assessed to the Tyted Co. were assessed to Abraham Teitelbaum and have been fully paid." (Exhibits Nos. 29CC, 30DD, and 31EE.)

Judge Russell E. Train of the Tax Court stated:

"Counsel agrees that this is an involved and complicated case, and there are as many issues in controversy as one can imagine. Exactly what item are we talking about." (Tr. of Rec. p. 1414)

THE FEDERAL COURT HELD, "IN THE TEITELBAUM CASE," IT WAS AFFIRMATIVELY SHOWN THAT, "HE HAD NOT CONCEALED ANY GROSS INCOME."

In the matter of Abraham Teitelbaum, cited in 253 Fed. (2nd) 1, this Honorable Court said, on p. 2:

"Judge Perry also commented: A mitigating factor was Teitelbaum's honesty in listing all of his gross income in his returns."

It is sincerely argued that the Respondent has attempted to throw doubts on the Court's Findings of Fact

by bringing in new theories in order to show additional gross income.

Mr. Seieroe, counsel for Respondent, in his opening statement (Tr. p. 216) stated in answer to the Tax Court's question, what was the total understatement in 1946, stated "It would be approximately $14,000."

It is respectfully urged that a tax on that amount would be less than 100%; however, for that same year of 1946, the Jeopardy Assessment levied and amount collected was, income tax $24,741.76 plus penalty $12,370.88, making a total tax of over $37,000, which Petitioner paid twice for himself and on behalf of Esther Melnick Teitelbaum, making a grand total of over $74,000 on this item alone.

The Court disallowed Christmas bonus from the client of Petitioner on the ground that it was not a gift, but additional revenue and income. Of course, every gift is voluntary, but, in the case at bar, a client gave his lawyer a Christmas gift of money in addition to the retainer paid. The relationship was an attorney-client one, and not employer-employee. Why did the Respondent allow a similar gift for the year 1948? No additional legal services were given for this gift. *The gift given was less than the exempted amount permitted as gifts, hence they were not taxable.*

It is somewhat interesting to note the testimony of a Mr. Ruggaber the tax expert for Respondent (Tr. pp. 1048-1053). On page 1052 he said:

> Q. "Can you determine what would be his correct tax on his individual income tax liability for the year 1946?
>
> A. "$8,549.07.

Q. "Assuming he paid $1,663.53?
A. "He would still owe $6,885.52."

Same questions were propounded as to Petitioner's liability for tax for 1947.
A. "$22,394.26."

Certainly, the above concrete evidence was overlooked by the Trial Judge, and this was evidence elicited from Respondent's witness.

The following matters and things, have either been overlooked or misapprehended by the Circuit Court, in that opinion, because of the consolidation of two tax cases based on different facts.*

I.

ASSESSMENT BASED ON NO RECORDS.

Respondent levied a tax assessment, in the second case, which had no foundation, either in fact or law. Prior to the levying of that tax assessment, there had been no examination of any kind of the books and records of the petitioner by any revenue agent, or of any agent of the respondent.

Of a certainty, any tax assessed against anyone, has no legality, unless, (a) it is based upon an examination

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* Included for review, in the instant proceeding before this Court, are two separate income tax trials of the petitioner: the first being for the years 1946 through 1947; and the second, being for the years 1949 through 1951.

For the now apparent purpose of overburdening the petitioner, both of said separate tax cases were consolidated and tried together, resulting in the badly confused record before the Court. Now patent, is the purposeful commingling of facts and issues, imposed upon this Court by the overriding determination of the respondent to pervert the orderly administration of justice in order to destroy petitioner.

of that taxpayer's records, and (b) the taxpayer must also be afforded an opportunity to review findings of revenue agents at the various levels available to each and all taxpayers (c) under the existing practices and existing customs consistently controlling (d) in the administration of the tax laws of the United States.

Equally, to deprive petitioner of each, every and all of the said rights violates not only the Due Process clause, but also the Equal Protection clause of the Constitution of the United States.

The record herein, unquestionably shows, that not only, at the time of the hearing of this matter by the Tax Court, for the very first time, did the revenue agents examine the books and records of the petitioner, but it also shows, by the wording and dates of the forms used to extend the statute of limitations, which are exhibits before this Court, that no examination of the books and records of the petitioner, by any agents of the respondent, preceded the assessment or the hearing of this matter in the Tax Court.

Petitioner respectfully urges this Honorable Court to review the Circuit Court's opinion on this point which should be determinative of the entire proceeding and in favor of petitioner.

The Jeopardy Assessments for the Years 1949 Through 1951, Were Made Without Any Examination of the Records of the Petitioner, as Admitted by the Agent.

The question that is unanswerable by the respondent, unless it wishes to demolish its case against the petitioner is this: Why did the respondent, long after the indictment and trial, request the petitioner to execute its requisite forms which would have extended the period of the statute of limitations against respondent, and would have enabled the respondent, had they been exe-

cuted, by the petitioner, to examine the books and records of the petitioner, for the very first time?

For the fact is that this petitioner, rendered impecunious by the unrelenting onslaught made against him, over a period of years, after he had divested himself of his monies and properties, as evidence of good faith regarding payment of his tax matters, was financially and physically and mentally incapable of gathering the material, accountants, attorneys, witnesses and money, to prepare and present any defense. It was for this reason, that he pleaded, nolo contendere. Only one who has faced the juggernaut of this form of federal power can comprehend the utter helpless and hopeless feeling of the petitioner, at that time, in that situation.

From the lips of a government witness, Mr. Tillotson, Internal Revenue Agent, comes this astounding testimony, as to the real issues that were involved in the second income tax criminal trial of the petitioner, as well as the second jeopardy assessments for the years 1949-1951, inclusive:

"By Mr. Teitelbaum:

"Q. Mr. Tillotson, do you know whether or not the firm of Teitelbaum and Melnick had a cash book showing receipts and disbursements for the year 1949?

"A. I do not know of my own knowledge. It was never given to me. It was never shown to me.

"Q. Have you ever seen this document before?" (The reference is to Petitioner's Exhibit 57.)

"A. No. I haven't seen any cash books prior to today." (Tr. 771.)

To further illustrate respondent's overzealousness, there is now pending in the Tax Court proceedings against Petitioner for taxes on subsequent years, also based upon no examination of the books and records of petitioner, Docket # 88322 & 89805.

Thus it is obvious, that until the government first saw and partially examined the books and the records of the petitioner, at the tax trial, as testified to by the government witness, Tillotson, that respondent was proceeding on surmise and conjecture, as the basis for this entire tax proceeding against petitioner.

II.

PETITIONER PAID PARTNERSHIP ASSESSMENTS.

The opinion of the Circuit Court correctly finds, in its second paragraph, that, on behalf of himself and his partner, Esther Melnick Teitelbaum, petitioner paid an assessment in excess of $340,000, for the years 1944 through 1948. Respondent made a determination in 1960 that the claimed partnership, was in fact and in law, not a partnership; that Esther Melnick Teitelbaum has not been a partner of petitioner since 1945. (Tr. 1438.) This determination by the respondent, was embodied in an exhibit filed in triplicate, and made a part of the record before the Circuit Court. (Appendix D(1))

On the basis of that determination by the respondent, petitioner is entitled to the return of $170,000, which is one-half of the $340,000, paid under protest.

III.

INDIO DATE RANCH EXPENSES.

The Indio date ranch was a business, operated as such, and deductions were allowed for the year 1948, by express stipulation with respondent. This reflected the attitude of the respondent, from that time, until the hearing before the Tax Court, in 1959. At the end of that hearing, which consumed three weeks, the trial judge became aware of the fact that there had been no examina-

tion of the books and records, checks, bills and vouchers of the petitioner. It was at this juncture of the proceedings, that the judge of the Tax Court, ordered one to be made. It is asked that this Court consider the propriety of such being ordered done, by the trial judge. Is it proper, in any sense, for agents of the internal revenue service, to first attempt to find the facts of the very matter then pending and actually on trial before the Tax Court?

Even so, petitioner's testimony remains uncontroverted by anything in the record before the Tax Court and this Court, that the Indio date ranch was operated as a business.

Additionally, the Tax Court failed to credit petitioner for his payments of interest on mortgages and real estate taxes on the date ranch. Surely the zealousness of respondent should not be permitted to compound his errors.

The purpose and intent of the express stipulation, entered into by the petitioner, with the respondent, was to reach an agreement to the fundamental fact, that in 1948, the losses of the Indio date ranch, were allowable and proper. In the face of this stipulation of fact, it is without any legal bases, unless evidence was introduced to show any change in either management or operation, which was not done, for the legal effect and consequence of that express stipulation to be disturbed or altered.

Wrongful Disallowance of Date Farm Losses for the Years 1949 Through 1951.

The judge of the Tax Court ruled that losses resulting from the operation of a date farm in California, where the wife of the petitioner lived, was not deductible as

business losses, by reason of the fact, existing only in the mind of the trial judge, that the date farm and a separate residence for the wife of the petitioner, were one and the same. With emphasis on the latter.

Of course, this is contrary to the stipulation—which conceded that losses were allowed by the respondent in the operation of the date farm for prior years. No evidence by respondent was heard, nor were any logical conclusions to be drawn that would warrant the determination of the Tax Court to the contrary. It is unimpeached by anything in the record, that the date farm was in the category of a business, on the record. That date farm did earn money, all fully accounted for, in the returns, but, in addition, there were also, losses. Both of these statements were substantiated by vouchers and checks introduced into evidence.

In the light of the finding of the Tax Court, the petitioner is unable to reconcile them, to this statement made by the trial judge of that court, according to the record:

> "If this was a bona fide farm operation, then the petitioner is entitled to a deduction. I don't know whether for all, but certainly some of these items. You cannot operate a farm for nothing. To exclude this evidence on the ground it is all the Petitioner has, on the basis that you have never seen it, seems to me, is not presently the position to do justice." (Tr. 984.)

And this has reference to the exhibits as to expenses of the date form, which were introduced into evidence, immediately thereafter (Tr. 879) and concerned with Petitioner's Exhibits 62, 63 and 64.

Again, we quote Mr. Seiroe, counsel for the respondent:

> "It seems that this disallowance (farm losses 1949 1950-1951) is not established, and if the loss was incurred that it is not established that it was a loss incurred in a business entered into for profit. I think that is a lot for us to admit but it is admitted in our stipulation that in 1948 there was a loss sustained of $28,000 odd and that loss was not disallowed." (Tr. 744.)

Yet, despite all of the foregoing, without any showing of any change of circumstances, the losses claimed as deductions, by petitioner in his returns, for the years 1949, 1950 and 1951, were disallowed *in toto*, without any basis ascertainable from the record.

Petitioner testified in the Tax Court proceeding:

> "I swear to your Honor, that these are legitimate bills. I say I take an oath that these bills were paid in the regular course of business, and this was a business venture. This was no hobby. It was something which we expected to make money. As a matter of fact the reverse turned out." (Tr. 875.) (Petitioner's Exhibit 62 was introduced into evidence, Tr. 879.) Please see Appendix "E".

The Tax Court should not have disallowed the amount of $54,140.56 for the three years in question.

IV.

CONVERSION OF ELECTRIC CURRENT FROM DIRECT TO ALTERNATING, WITHOUT ENHANCING THE VALUE OF THE BUILDING, DOES NOT CONSTITUTE A CAPITAL EXPENDITURE, BUT MERELY ORDINARY EXPENSE.

The ruling of the trial judge of the Tax Court, on the matter of the converting of the electric current system in the Fine Arts Building, from D.C. to A.C., involving $133,985, was:

"• • • that the cost of converting the electricity in a building from direct current to alternating current as required by ordinance of the City of Chicago was a capital expenditure."

For the facts are and the uncontroverted proof is that the Commonwealth Edison Company, assumed, as its portion of this expenditure, all monies in excess of $79,951.66. Yet, the Respondent disallowed this sum, in addition to $2,000 claimed as additional disbursements.

However, respondent had earlier entered into a Stipulation of Facts, with the Respondent, covering this precise matter: the Second Supplemental Stipulation of Facts. (Pages 75-77, Respondent's Brief.) The failure of respondent to (a) introduce any evidence to challenge this stipulation in any respect, and (b) the respondent's failure to contradict or challenge the testimony of Alexander Spitz, architect and engineer in charge of the conversion, is submitted that the ruling of the trial judge of the Tax Court, on this point, is arbitrary.

Alexander Spitz, the architect and in charge of the changeover from D.C. to A.C. current, in the Douglas Building, testified that the changeover did not increase the value of that building. (Tr. 854.) He amplified that statement with these words:

"It just merely puts the building in compliance with the law." (Tr. 857.)

The disallowance of the costs of conversion for the year 1949, amounts to $29,459.11; the disallowance of the conversion for the year 1950 amounts to $67,313.60. So the total cost that the Tax Court refused to disallow, for the cost of the conversion, from D.C. to A.C., for the Douglas Building, also known as the 20 E. Jackson Building, is the sum of $96,772.71.

The conversion of the electric current from direct (DC) to alternating (AC), properly should be considered a necessary expense, rather than a capital item. Indeed, the Commonwealth Edison Company, which shared the expenses of that conversion, in that building, deducted that amount that it contributed to that conversion, as expense in its income tax return.

The dissenting opinion, which considers that conversion expense to be an ordinary and necessary one, rather than a capital expense, brings this question to mind for this Court to consider: What would be its ruling, should the City of Chicago, in another year, pass an ordinance, requiring the conversion of that property back to direct current (DC) from its present alternating current (AC)? It would yield an incongruous result, should this Court again hold that that conversion was another "capital" expense, but that would be the way that this Court would have to hold in the name of consistency.

V.

TRAVEL AND HOTEL EXPENSES.

Page 8 of the opinion, Appendix "A", states that the Tax Court properly found no deductible travel expenses beyond those allowed by the respondent. None was allowed by respondent for hotel or travel expenses for the years 1949, 1950 and 1951, involved in the second Tax Court proceeding, in spite of the facts, uncontraverted, as disclosed by hotel bills paid, receipts, checks and airline tickets. None of these silent witnesses had been seen, nor their production requested by any internal revenue agent.

Moreover, since the opinion finds that while in Chicago, the petitioner lived at a hotel, and maintained his resi-

dence in Indio, California, it appears that he should be allowed travel expenses, to and from Chicago, as well as hotel expenses, for there is no assertion that he did not conduct business in Chicago. Further, if the respondent, maintains that the Indio operation was not a business, but a residence, this was the home petitioner left and returned to, from time to time.

Obviously, the respondent cannot have it two ways: he must admit that the Indio operation was a home, and allow travel expenses, or he must admit that the Indio operation was a business, and allow travel expenses.

Wrongful Disallowance of All Hotel and Travel Expenses for the Years 1949 Through 1951.

The entire record is barren of any evidence that supports the conclusion of the Tax Court: no travel expenses are allowed for 1949, 1950 and 1951.

Between 1947 and 1952, the petitioner owned no Chicago residence: petitioner sold his Chicago residence in 1947 and owned none until 1952.

During the period, 1947-1952, the respondent resided, when in Chicago, at a hotel in Chicago, the Blackstone, notwithstanding respondent's statement to the contrary, in his Brief, page 20. It was to and from this place, that he came and went, as his affairs and business demanded. Although the Tax Court held, that the date farm, in Indio, California, was the home of the respondent's wife, and so could not be a business of the respondent, yet the Tax Court held that travel expenses to and from Indio, California, were not deductible as travel expenses, and were disallowed. It is patent that if the respondent resided in Chicago or in Indio, that travel expenses must be allowed and deductible, from either one place, or the other, as the residence of the

petitioner, to any other places. And all travel expenses claimed by this petitioner, were supported by vouchers and checks for the years 1949, 1950 and 1951. And the testimony of the petitioner to all of this is uncontested, so the decision of the Tax Court, on these matters, is manifestly against the weight of the evidence.

At page 39, of respondent's brief appears this:

> "In brief, for the years 1946 and 1947, this case involves the repeated failure by the taxpayer to report substantial items of gross income * * *"

This unwarranted assertion of the respondent is completely negated by these words, uttered by the trial judge, J. Sam Perry, concerning the selfsam taxpayer (*In the matter of Abraham Teitelbaum*, 253 Fed. 2d 1, 2):

> "A mitigating factor was Teitelbaum's honesty in listing all of his gross income in his returns."

Again, at page 51 of respondent's brief, it is said:

> "The taxpayer introduced no proof of deductible travel and hotel expenses in excess of the amounts allowed by the Commissioner".

This statement is not supported by the facts within the record, and within the knowledge of the respondent:

> "It is the court's understanding that the respondent is willing to agree that Mr. Teitelbaum does have vouchers and travel stubs which substantiate the payments shown on Exhibit number 58 covering travel for 1951." (Typewritten Appendix, filed by petitioner; p. 912, *et seq.*)

As if this were not sufficient to convince this Honorable Court of the character and contents of the brief of the respondent, this statement, made by Mr. Scieroe, counsel

for the government, who made this statement of admission in the proceeding before the Tax Court:

> "For 1949 and 1950 I think we could agree that the airline tickets which Mr. Teitelbaum has will substantially agree with the travel indicated as a deduction on the return. Not so as to 1951 where he lumps travel and hotels together. We just don't know in that case." (Tr. 911.)

The Tax Court judge wrongfully denied petitioner his claimed, and proved, deductions, for all travel and hotel expenses, for the years 1949 through 1951, in the amount of $30,207.52.

VI.

WRONGFUL DISALLOWANCE OF LOSSES IN RADIO STATION WMOR.

Although the corporation that owned the station (Metropolitan Radio Corporation) was adjudicated a bankrupt in 1952, it is obvious that it had arrived at that condition prior thereto. There being no better evidence of uncollectibility than bankruptcy of the debtor, and the undisputed testimony that the losses occurred in 1951: that Station WMOR ceased to operate in December of 1951, and went into bankruptcy thereafter, certainly upsets the findings of the Tax Court, with regard thereto.

It is undenied that respondent filed his claim for $71,000, and it is also undenied that respondent received no dividends from the bankrupt corporation.

And in proof of the correctness of this contention of the petitioner, we offer the statement from and in confirmation of this contention of the petitioner, from the brief of the respondent. There the respondent makes our position very clear, in the respondent's Statement of Facts, page 23 of his brief.

"During the year 1950 the stock of the Metropolitan Radio Corporation of Chicago, Inc., hereinafter referred to as Metropolitan, which owned and operated station WMOR, an FM radio station, was held by various individuals including Donald Kiesau, and Daniel L. Toffenetti, officials of the Chicago Restaurant Association. Sometime in 1951, Kiesau, Toffenetti and others, aware that the corporation was proceeding to insolvency, sold their stock to the taxpayer at about ten cents on the dollar. The taxpayer intended to help Kiesau and Toffenetti by taking the stock off their hands. (R. 1333, Appendix B, *infra*.)"

The respondent by these words concedes this contention of the petitioner.

Further the typewritten appendix sets forth that a Joint Exhibit as to Station WMOR, was entered into and introduced, showing its itemized expenses. Referring to this, the following occurred between Mr. Berman, one of the counsel for the respondent:

> "Mr. Teitelbaum: I have a document I would like to offer as a joint exhibit.
>
> "Mr. Berman: No objection.
>
> "Mr. Teitelbaum: It set forth the entire bankruptcy of Station WMOR and the monies advanced for the station were gone, finished, and at an end, and the monies were paid in 1951. (Transcript of Record 769; Joint Exhibit 56 A 5.)
>
> "Q. What amount of checks could you not verify as being in connection with Station WMOR?
>
> "A. This is an amount of $22,269.99 which I could not verify as being expenses of WMOR." (Tr. 784.)

Thus, the witness for the respondent, by his admission that he could not verify the sum of $22,269.99, admitted that he could verify approximately $50,000, of the claimed

$71,000. By this admission, approximately $50,000 claimed by the petitioner should not have been disallowed by the Tax Court, for losses sustained by the bankruptcy of radio station WMOR.

The Trial Judge stated that the loss of $71,000 for Radio Station WMOR was not allowable in 1951, because the corporation was adjudicated a bankrupt in 1952. *This finding is clearly erroneous because an involuntary petition in bankruptcy was filed for the radio station, and the radio station ceased to do business in December 1951.*

All payments and advances were made by Petitioner only in 1951. Petitioner filed his claim in the Bankruptcy Court, and there was no dividend. The law is equally clear that the losses are deductible in the year that they have occurred and not by the date when a corporation is adjudicated a bankrupt.

Citing *Sabath* v. *Commissioner*, 100 F. (2d) 569.

The Tax Court held that the losses of the Metropolitan Radio Corporation could not be deducted, in 1951, because that corporation was adjudicated a bankrupt in 1952. The Tax Court held that at least $48,289.83 was paid as and for expenses of that corporation. (Opinion p. 8.)

On this point, the evidence submitted to the Tax Court, was the testimony of petitioner: that he paid all of that money out in 1951, when that radio broadcasting corporation ceased to do business. This uncontroverted evidence of uncollectibility had further probative force by the filing of a claim therefor in the Bankruptcy Court, and, the receipt of no dividend.

The numerous authorities, on the point of when losses should be deducted, all enunciate this principle: losses are deductible in the year in which they actually have occurred.

VII.

DISQUALIFICATION AND PREJUDICE.

To discuss the question of whether or not the judge of the Tax Court should have disqualified himself is apparently only a matter of procedure. Petitioner did not accentuate that point in his oral argument. The question of prejudice of that trial is urged upon this Court, that what is really involved is a question of judicial morality: that at the outset, the duty was incumbent upon the judge of the Tax Court of making his knowledge of his attitude toward the petitioner, quite clear.

It is incorrect to say that that trial judge had had no connection with or knowledge of the petitioner prior to petitioner's trial in the Tax Court before him.

Can it be reasonably said, that the drama, impact, implications and tensions of the King Committee, an arm of the Congress had not left an impression on that trial judge? Of that incident, later, May 18, 1959, in the Tax Court proceeding (Tr. p. 81), Russell E. Train, Judge, said:

> "and I mentioned in passing that I had been present during those hearings and had heard you testify. I was at that time an attorney on the staff of the Joint Committee on Internal Revenue Taxation, an arm of the Congress, not a member of the staff of the King Subcommittee."

Thus, according to his own words, the judge of the Tax Court, while employed by one arm of the Congress,

as an attorney on the staff of the Joint Committee on Internal Revenue Taxation, was an interested auditor and spectator when the respondent testified before another arm of the Congress, the King Subcommittee. In view of the certain recollection of the trial judge, of the occasion of this petitioner testifying, under those most unusual circumstances, and in view of petitioner's testimony, and the repercussions and consequences that grew out of that hearing, it rather strains credulity, to assume that the trial judge of the Tax Court, might not have received some impressions of the petitioner, then and there, which he perforce carried in his mind, even unaware of their presence, and which may have affected his rulings in that trial. Please read Appendix "G".

Of a certainty, they had some effect. However, it is suggested that "due process" does not contemplate that the trial judge should have any pre-conceived attitude or disposition, for or against the person on trial before him. Hence, it is urged, that the duty was on the judge, *sua sponte*, to refuse to preside, and thus remove even the possibility of prejudice on his part.

STIPULATIONS.

From time to time, during the entire period of the involvement of the petitioner, with the respondent, a series of stipulations were entered into, by and between the petitioner and the respondent. These set out and specified certain facts on which both signatories thereto, had agreed as being true, correct and binding upon both parties to these proceedings. They were unalterable, ultimate facts and factual conclusions.

But here, stipulations removed certain contentions. On the facts and conclusions therein specified, there is nothing for the trial judge to do, but to accept them, for he has

no independent means of obtaining evidence on those matters. Please read Appendix "F".

Since such was not done here, the Tax Court judge has disregarded the stipulations, and had no evidentiary basis for adducing the proof on which to predicate his decision on the matters and things covered by the stipulations of the adversary parties to this proceeding.

VIII.

ROOSEVELT COLLEGE MORTGAGE.

On page 7 of the opinion of this Court, it is stated:

> "Mr. Teitelbaum promised to produce the original copy of a letter. Thus the determination of whether the interest payments were by agreement converted to principal rested on the tax Court's evaluation of Mr. Teitelbaum's credibility on this point. The Commissioner's investigation had disclosed no knowledge of this agreement on the part of the Roosevelt College authorities."

Petitioner testified that the letter mysteriously disappeared during the tax Court hearing. The respondent who had the burden of proof could have subpoenaed the authorities of Roosevelt. Petitioner could not afford to do so because of his impecuniosity, occasioned by the hardships brought about by the conduct of the respondent. However, on September 5, 1961, petitioner visited Roosevelt University, and there the original receipt agreement was found, not in the President's office, but in the files of the Dean.

A copy is hereto annexed as exhibit "A", which not only vindicates the veracity of petitioner, but also resolves the issues clearly in his favor. (The original is on file with the Clerk of the Circuit Court.)

EXHIBIT "A".

ROOSEVELT UNIVERSITY
430 South Michigan Avenue
Chicago 5, Illinois

Office of the President

September 5, 1961

Mr. Abraham Teitelbaum
506 North Rexford Drive
Beverly Hills, California

Dear Sir:

The attached receipt is a true and correct photo-copy from the original that is in our files which shows that the interest payments of $2,500.00 each totaling $7,500.00 were applied on principal in lieu of interest during 1949.

Very truly yours
/s/ Mary L. Soroda
Secretary to
President Edward J. Sparling

October 31, 1949

This is to acknowledge the receipt of One Hundred Ninety Thousand Dollars ($190,000.00) by Cashier's check number S64712 and further acknowledge the receipt in February, May, and September, 1949 of interest payments of Twenty Five Hundred Dollars ($2,500.00) each which sums are applied on principal in lieu of interest, totalling One Hundred Ninety Seven Thousand Five Hundred Dollars ($197,500.00) in full satisfaction and accord of the present Two Hundred Fifty Thousand Dollar ($250,000.00) First Mortgage indebtedness of the Roosevelt College on the north 52 feet of Auditorium Building now occupied by Roosevelt College.

/s/ Abraham Teitelbaum

Accepted:
Roosevelt College
By s Edward J. Sparling
President

(Photocopy on file with Clerk of the Circuit Court.)

IX.

CHICAGO RESTAURANT ASSOCIATION GIFTS.

The payments that were made to petitioner met all requirements of the law of gifts. During the years that $2,000 were permitted as a gift without the payment of a tax thereon, only that amount was given per year. When the permitted amount was increased to $4,000, that was the amount given. This was the design and purpose of the Restaurant Association in giving the gifts.

A year-by-year comparison of these gifts, with that of the compensation paid to petitioner by the Restaurant Association, will convince this Court, that the amount of compensation paid by the Restaurant Association, as it was increased from time to time, bears no relation state to the amount of the gift paid in each year.

X.

RECAPITULATION

First Tax Case

Petitioner Paid Under Protest	$3,000.00
Tax Expert's Testimony, Money Due	$ 29,279.78
Tax Court Admits Overpayment Less	$ 10,125.83
Money Due Petitioner, Overpayment	$324,846.05

Present contention by respondent that no partnership existed.

Second Tax Case

No money is due respondent because:

1. No examination of books and records as admitted by agent of respondent.

2. Penalties provision for estimated taxes is unconstitutional.

XI.

PETITIONER IS ENTITLED TO THE EQUAL PROTECTION OF THE LAWS.

Petitioner respectfully contends that he is entitled the equal protection of the laws.

Petitioner's partner, Mr. Paul R. Simon, had a tax case in the Tax Court of the United States, for the years 1946 and 1947 based on almost the identical facts, and the Trial Judge was advised that Paul R. Simon settled his tax case by compromise with Respondent for $33,000 which was approximately 15% of his total liability. (Tr. p. 1357.)

Shall Mr. Simon settle his tax problems at 15% and Petitioner be penalized because of his co-operation?

The Internal Revenue now states: (1960)

> "Upon examination of the partnership it has been determined that Esther Melnick Teitelbaum has not been a partner in fact since 1945 and that all the income from the alleged partnership is taxable to Abraham Teitelbaum." Tr. p. 1438.

This is the tenth switch of theories on Respondent's part in order to justify unjust Jeopardy Assessments.

In case of *Hamilton* v. *Regents*, cited in 293 U.S. 245, the Court said, on p. 216:

"The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States."

"Those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources."

Since Esther Melnick Teitelbaum's purported taxes for the years involved, amounting to approximately two hundred thousand dollars was paid by Petitioner, why isn't he given, now, a refund for said amount upon this recent ruling of Respondent?

In *Stirone* v. *United States*, cited in 361 U.S. 212 the Court held on page 217.

"Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same."

"While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a Grand Jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

On page 219 the Court further said.

"Yet because of the Court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the Grand Jury never made against him. This was fatal error. Reversed."

In the case at bar, the variance between the indictment and the bill of particulars was a fatal one. *And now in*

1960 the Respondent admitting that no partnership existed since 1945, actually renders the conviction a nullity.

The giving of instructions that a partnership existed, and permitting the Jury to find the defendant Guilty of same, allowed the Government to try defendant on another theory. This cannot be done under our laws of American Jurisprudence.

XII.

SECTION 58, I.R.C. IS IN CONTRAVENTION WITH THE 16TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND IS THEREFORE UNCONSTITUTIONAL.

Section 58 (a) (2) I.R.C. provides for a tax on estimated income, which is merely a wish or conjecture on the part of the taxpayer.

The 16th Amendment of the United States Constitution provides

> *"The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several states and without regard to any census or enumeration."*

It is petitioner's contention that "income" includes everything that is of a tangible value already realized by the taxpayer and must exist at the time of filing taxpayer's return.

In *Helvering* v. *Horst*, 61 Supreme Court Page 144; 311 U. S. 112 reversing *Horst* v. *Commissioner of Internal Revenue*, 107 Fed. (2) P. 906 the Court said:

> "The realization of income, rather than the acquisition of the right to receive it, is the taxable event and is not deemed to occur until the income is paid, but not all economic gain of taxpayer is taxable income."

"Income" has been described as, gain derived from capital, labor, or from both combined, and must be new property acquired or increment detached from former investment and to be taxable by Congress under the 16th Amendment must have been received.

Trust Company of Georgia v. *Rose*, 25 F (d); 997, affirmed *Rose* v. *Trust Company of Georgia*, 28 F. (2d) 767; *North Texas Lumber Co.* v. *Commissioner of Internal Revenue*, 30 A (2d) 680; *Maryland Casualty Co.* v. *U. S.*, 40 S. Ct. 155, 251 U.S. 342, 64 L. Ed. 297; 37 F. Supp. 217, 37 F. Supp. 811; *Eisner* v. *Macomber*, 40 S. Ct., 189, 252 U. S. 189.

Taxes on income accrue at the end of the year and not from day to day, *Blair* v. *W. G. Ragley Lumber Co.*, 30 F. (2d) 683 and are laid on the basis of actual fact and not on theories, *Haagh & Keenan Storage & Transfer Co.* v. *Heines*, 20 F (2d) 921.

The estimated income as provided in Section 58 (a) (2) is not anything in existence at the time petitioners are required to file their estimation form. To be taxable income under the 16th Amendment of the United States Constitution, it must not only exist but be realized at that time. The estimation for a future income is speculative, a conjecture, a desired wish. It is merely theorizing on a future event such as gambling with tax payers' opinion. Funk and Wagner's dictionary defines that speculation is a mere conjecture which is a formal opinion. It was not the intention of the founders of these United States and the Congress to pass laws of a speculative nature. In *Ex Parte Quinn* 63 S. Ct. 2, it was said:

> "Congress and the president like the Courts possess no power not derived from the Constitution."

The foundation of our democratic form of government is based primarily on the Constitution of the United States and its amendments and all powers of government are derived therefrom.

In *Marbury* v. *Madison*, 1 Cranch, 137, the Court stated "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." "This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by these departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited."

John Marshall, in the Virginia Convention of 1788, declared, "If they (the legislature of the United States) were to make a law not warranted by any of the powers enumerated, it would be construed by the judges as an infringement of the Constitution which they are to guard. They would declare it void." James Wilson, in the Pennsylvania Convention of 1787 declared "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American States."

Petitioner find no provision in the Constitution of the United States of America wherein the Congress has any right or authority to compel or to control by legislation the right of the people to think or to compel them to speculate on future events.

The 16th Amendment of the Constitution did not extend taxing power of the United States to new subjects.

Bunn v. *Willenta*, 29 F (2d) 132.

Whether Or Not The Penalties Under Section 294 (d) (1) (A) and 294 (d) (2) I.R.C. Are Harsh, Confiscatory And Unconstitutional.

Section 294 (d) (1) (A) and 294 (d) (2) provide for penalties for the taxpayer's failure to file an estimated income within the specified time as provided under Section 58, I.R.C.

Petitioner contends that these sections of I.R.C. are repugnant to the Constitution of the United States in that they provide an excessive penalty for failure to file under Section 58 I.R.C. It also follows that if Section 58 I.R.C. is contrary to the 16th Amendment of the Constitution of the United States, then all penalties thereunder would be illegal and unconstitutional.

They are repugnant to the first Amendment of the Constitution in that they command the individuals, regardless of their religious or moral convictions by means of a written document made under oath, to prognosticate, speculate, bet, estimate on the future results of any and all financial activities they may engage in, and believe that they are correct within eighty per centum of their estimation in fulfilling that oath.

These sections are contrary to the 7th Amendment of the Constitution in that the penalties amount to over $20.00, and it deprives the taxpayers of their right to a trial by a jury.

These sections give the commissioners the power to arbitrarily penalize and assess the tax payers through their administrative functions and they are further un-

constitutional in that it substitutes and confers the judicial powers on the commissioner. It is contrary to all intent and purpose of the Constitution of the United States of America to penalize petitioner for his failure to speculate on what his future eranings might be and more particularly in his case where he has no direct control over gross income and his records are often delayed for weeks before being received by him.

Because petitioner herein failed to speculate on a future income, over which he has no control and which varies greatly from year to year, the Commissioner has assessed a penalty under Sections 294 (d) (1) (A) and 294 (d) (2) contrary to the Constitution of the United States of America and in manner of computation contrary to all facts pertaining to actual earnings. Therefore no liability or penalty should be chargeable to petitioner. Appendix D(3).

RESPONDENT'S INCONSISTENT THEORIES.

At one time or another, the Respondent has made various inconsistent theories of tax responsibility against Petitioner. They are:

1. Petitioner is liable for the tax.

2. Petitioner is not liable for the tax, but liability is to the Tyted Co., a Corporation. (Joint Exhibit 3c Par. 7)

3. The tax liability was that of his partner, Esther Melnick Teitelbaum. (Tr. of Rec. 1411)

4. The Tyted Co. was a naked trust, and all taxes that could have been assessed to the Tyted Co. were assessed to Abraham Teitelbaum, and have been fully paid (Exhibit #29CC, 30DD, 31EE.)

5. The Bill of Particulars states that the Tytel Co. still owes taxes. (Joint Exhibit 3C) (Tr. of Rec. 700)

6. Theory of constructive dividends. (Disallowed by Tax Court)

7. Wife liable as transferee. (Tax Court Decision cancelling Tax)

8. New Theory of alternate tax liability presented to tax court. (Amended pleading filed in 2nd Tax case.)

9. The existence of a partnership. (Exhibit 4D Vol. 2 page 5)

10. The non-existence of a partnership. (Tr. of Rec. 1438)

In both indictments, Bills of Particulars, pleadings and even the instructions to the Jury, a partnership entity between Abraham Teitelbaum and Esther Melnick was charged to be in existence by Respondent. (Exhibit 4D Vol. 2 page 4)

Now, in August 16, 1960, the Internal Revenue Service stated: (Tr. p. 1375.)

1. "Esther Melnick Teitelbaum (the taxpayer's former wife) has not been a partner in fact or by law since 1945, and all the income from the alleged partnership, Teitelbaum and Melnick is taxable to Abraham Teitelbaum." Appendix D(1)

2. Forms for extension of statute of limitation to examine records sent to taxpayer after assessment. (Exhibit furnished to Circuit Court. Appendix D(2)

3. Only facts appearing on face of returns as to deductions were disallowed by respondent arbitrarily. This outlaws fraud.

4. Arbitrary assessments against petitioner made to cloud the real issues, prevent a refund, and deprive him of a livelihood, together with his present constant harrassment by respondent's agents only accentuate the real facts.

XIII.

REASONS FOR GRANTING WRIT.

1. The decision below affects every taxpayer in the United States.

2. The decision below is clearly erroneous.

3. The decision below presents continuing questions of importance under present tax laws.

4. There is a real necessity for judicial interpretation of existing tax laws to prevent undue hardships and grant every taxpayer the equal protection, and due process of law.

The Constitutional questions of law involved, upon which petitioner seeks a review of the decisions of the lower Courts are in the main the basic and fundamental principles of law embodied in the Bill of Rights governing our American way of life.

The paramount question is "Can the Internal Revenue Dept. levy a tax on any individual without first examining the books and records of that person?" Is it possible by some erroneous principle of concept the Internal Revenue Dept. believes it to be above the law?

This is exactly what somebody representing the Internal Revenue Dept. did, and still are trying to do,—to impose a tax of X dollars on petitioner without any examination of the available books and records of petitioner and under the guise of authority has unlawfully used the instrumentalities of the Courts to destroy him as a citizen and deprive him of his Constitutional rights guaranteed under the Constitution of the United States.

CONCLUSION.

In each and every one of the foregoing sections, petitioner has attempted to point out, specifically, matters and things that the Circuit Court has overlooked and/or misapprehended.

Fundamentally, all support the contention of the petitioner, that what has been accorded to him, since the commencement of his tax involvements, since 1946, illustrates the maxim so well: "the power to tax is the power to destroy". It is his belief, supported by the record before this Court, as well as all of the consequences that have flowed therefrom, that the power to tax has been used to destroy him, as a person, a citizen, an attorney and as a payer of taxes in substantial amounts.

So long as the overzealousness of the respondent, with his vast assets of governmental power, manpower of agents and accountants, and financial resources, is permitted to direct his efforts toward the destruction of an individual, rather than toward the just collection of taxes in the amount justly due, is permitted, just that long is every citizen, including the petitioner, as each becomes the target, in the dangerous situation of being accorded treatment not only violative of "due process", but also equally violative of the "privileges and immunities", and "equal protection" guaranteed to every citizen.

No one can disagree with the principle, violated herein, "that none shall be destroyed under the guise of collecting the income tax." On that proposition, this case is bottomed, and petitioner seeks a reversal of the Circuit Court.

Mr. Justice Oliver Wendell Holmes in his book on Taxation stated," I love to pay taxes, with taxes I buy civilization". It is respectfully urged that the late Justice meant that everybody should pay only their just taxes and not oppressive and illegal ones.

The gambling on future estimate of income is illegal, unconscious, and unconstitutional.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ABRAHAM TEITELBAUM, *petitioner,*
Attorney pro se.

APPENDIX "A".

OPINION OF U. S. CIRCUIT COURT OF APPEALS
dated August 24, 1961

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1960—APRIL SESSION, 1961

No. 13150

ABRAHAM TEITELBAUM, *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition to Review Decision of the Tax Court of the United States.

August 24, 1961

Before HASTINGS, *Chief Judge*, and MAJOR and KNOCH, *Circuit Judges*.

KNOCH, *Circuit Judge*. Petitioner, Abraham Teitelbaum, seeks review of decision by the Tax Court which reversed in part and affirmed in part determinations made by the Commissioner of Internal Revenue, respondent herein.

On behalf of himself and his partner, (his first wife, Esther Melnick Teitelbaum) the petitioner paid a jeopardy assessment in excess of $340,000 including taxes, interest, penalties and costs, for the years 1944 through 1948. In 1955, there was another jeopardy assessment against peti-

tioner for the years 1949 through 1951. Mr. Teitelbaum's petitions for re-determination of both assessments were consolidated for trial.

Mr. Teitelbaum lists the contested issues as follows:

1. The trial Court Judge Russell E. Train should have in good conscience informed Petitioner at the start of the hearings of the consolidated petitions for tax redetermination, that he was the minority member of the King Congressional Committee in 1951 investigation of Income Tax Irregularities in which proceeding Petitioner was a main witness, who thought it was his civic duty to give testimony in which he was an intended victim of a $500,000 extortion plot.

Had Judge Train, at the start of the proceedings, made a statement as to his being a member of the minority group of the King Congressional Committee, or an attorney on the Staff of the Joint Committee *on Internal* Revenue taxation, then his statement having been made, it would have been up to Petitioner either to exercise his Constitutional prerogative to ask or not to ask for a change of venue. (Tr. pp. 1387, 1430),

On pages 1923 of the Tr., Petitioner called to the Court's attention his participation as a witness before the King Congressional Committee. This remark was made in Petitioner's opening statement to the trial Judge. (Tr. p. 148)

2. The majority of the rulings of the trial Judge were erroneous in law and not based on the evidence.

3. The rulings of the trial Judge in favor of Petitioner did not result in the return of any money paid under protest, because of his ruling in the second tax case.

4. The burden of proof of fraud, being on Respondent, the same was not discharged.

5. The trial Judge failed to honor the stipulations of facts filed in the cases. (Tr. pp. 127 to 145 Incl.)

From the record it appears that Judge Russell E. Train, who heard this case in the Tax Court, was an attorney on the staff of the Joint Committee on Internal Revenue Taxation and never a member of the staff of the King Subcommittee. Judge Train was a mere spectator to Mr. Teitelbaum's testimony as a witness before the King Subcommittee, and took no position adverse to Mr. Teitelbaum. Mr. Teitelbaum, himself, stated in the Tax Court hearing:

> I am perfectly satisfied with your Honor. I certainly wouldn't have asked for a change of venue * * * Tr. 1398)

The record affords no support for any finding of disqualifying personal bias or prejudice. *Tucker v. Kavanagh*, 7 Cir., 1950, 186 F. 2d 79.

While Mr. Teitelbaum was counsel for the Chicago Restaurant Association, he received certain sums which he characterized as Christmas bonus gifts and which he did not report as taxable income. Whether these sums were gifts exempt from tax or were taxable compensation presents a question of fact. If the payments proceeded primarily from the constraint of a moral or legal duty, they were not gifts. *Bogardus v. Commissioner*, 302 U. S. 34, 41 (1937). The minutes of the Chicago Restaurant Association disclose the motive for the payments. The minutes indicate:

> * * * at this time of the year we usually consider the matter of a Christmas Gift to Mr. Teitelbaum to cover additional expenses which he incurs. (Exh. 9Q

In a letter from the Executive Vice-President of the Association, Mr. Teitelbaum was advised:

> In the past years, * * * you received sums of money at or about Christmas each year. * * * While the latter was in the nature of a gift, it was intended to augment your expense account * * * You have always advised us that the expenses we gave you, in addition to the basic retainer, was not sufficient. (Exh. 3S

The Tax Court's finding that the Christmas bonus gifts were compensation is not clearly erroneous and must stand. Federal Rules of Civil Procedure, Rule 52(a).

It was stipulated between the parties that (Second Supplemental Stipulation of Facts):

> 23. The partnership return of Teitelbaum and Simon for the year 1950 claimed a deduction for the conversion of electricity in the Fine Arts Building from D.C. to A.C. This conversion was done pursuant to an ordinance of the City of Chicago.

Mr. Teitelbaum deducted the cost of this conversion (almost $80,000) as an ordinary and necessary expense paid or incurred during the taxable year in which it occurred. It was Mr. Teitelbaum's contention that the conversion added nothing to the value of the building, although his architect, on cross-examination, did state that he would advise a buyer who contemplated the purchase of a building in which such conversion was required by ordinance and had not yet been made, to take the cost of such conversion into consideration in arriving at a purchase price.

The Tax Court held that the electric conversion was a capital expenditure which must be amortized out of the income from the years of its useful life. Mr. Teitelbaum argues that the Tax Court thus ignored the stipulation quoted above. We find no contradiction between the stipulated facts and the Tax Court's finding. The mere fact that the conversion was involuntary and made only to comply with a city ordinance does not render it an ordinary expense. Involuntary modifications made to comply with orders of municipalities or regulatory bodies have been held to be capital items and not deductible expenses. Even though they may not improve the property by increasing its attractive appearance or efficiency, or prolonging its life, such modifications do render the property more valuable for the taxpayer's use by bringing the property into compliance with applicable regulation. *Parkersburg Iron* v. *Burnet*, 4 Cir., 1931, 48 F. 2d 163, 164, 165; *R.K.O. Theatres, Inc.* v. *United States*, Court

of Claims, 1958, 163 F. Supp. 598, 602; *Woodrich Woolen Mills v. United States*, Dist. Ct., M.D. Pa., April 19, 1961 ..... F. Supp. .....

In 1948, Mr. Teitelbaum and his first wife acquired property near Indio, California, which included a date ranch and residential facilities. The Tax Court found that out of a total consideration of $127,372.09, at least $88,872.09 was allocable to the residence and related improvements, which included a main house with a high ceilinged, two fireplace living room of 45 x 60 feet, a guest house, swimming pool, pool house and servants' house. About $21,000 was allocated to the land and $17,500 to the trees and related improvements. There were also a caretaker's house, a house for the farm laborers, 300 date trees covering about six to seven acres, and about two and one-half acres of grapefruit. Mr. Teitelbaum asserts that the date ranch was never intended to be a recreational hobby but was conducted as a separate business enterprise which, in the hands of his predecessor, had earned a profit of as high as $45,000 in one year. However, that predecessor had informed Mr. Teitelbaum that during the years following World War II, the price of dates declined, and that an overall loss had resulted for the most recent year, which would be claimed by the predecessor as a business loss for tax purposes. Mr. Teitelbaum had also sought information from the Date Growers' Association in California. In 1947, domestic date prices were declining, partly because of newly begun importation of dates from abroad.

The absence of a profit motive is significant in determining whether an enterprise is conducted as a business. *White v. Commissioner*, 6 Cir., 1955, F. 2d 779, cert. den. 351 U. S. 939. Where a taxpayer derives substantial income from other occupations, the size and character of his regular business, of the farm, its operation and records, his time and effort expended, and the nature of the residential facilities, are all elements in determining whether the taxpayer is conducting a business venture for profit or

cultivating a farm as an adjunct to a country residence. *Morton* v. *Commissioner*, 2 Cir., 1949, 174 F. 2d 302, cert. den. 338 U. S. 828; *Coffey* v. *Commissioner*, 5 Cir., 1944, 141 F. 2d 204.

Mr. Teitelbaum was allowed to deduct his losses from this operation in 1948, and he contends that no change in operation occurred for succeeding years. The first Mrs. Teitelbaum used the big house and its related buildings as her major residence from the time of its acquisition and continuously after her separation from Mr. Teitelbaum in 1949.

The Tax Court found that no adequate records were maintained for the date ranch, the substantial residential expenses being commingled with those of the farming operation. The Tax Court characterized Mr. Teitelbaum's evidence in this regard as "a mass of unsorted cancelled bills." No effort had been made to segregate them. The evidence supports the Tax Court's conclusion that no attempt had been made to put the ranch on a paying basis, that Mr. Teitelbaum devoted little time to the operation and exercised no managerial responsibility after separating from his wife in 1949. In *Field* v. *Commissioner*, 26 B.T.A. 116 (1932) affirmed 2 Cir., 1933, 67 F. 2d 876, and in *Security First National Bank of Los Angeles* v. *Commissioner*, 28 B.T.A. 289 (1933), on which Mr. Teitelbaum relies, there was a complete separation of the residence and farming facilities in both accounting and operation, and a business-like effort to conduct a profit-making venture. Although Mr. Teitelbaum asserts that he acquired the property in hopes of securing gains, there was no basis for a finding that he had a good faith intention to operate the date ranch as a business venture for profit.

On May 31, 1944, the Tyted Company was incorporated under the laws of the State of Illinois. Mr. Teitelbaum was its initial registered agent. The total authorized stock was 1000 shares. On June 2, 1944, the corporation issued 1000 shares of its capital stock. Nine hundred ninety-nine shares went to Mr. Teitelbaum and his first wife, Esther Melnick Teitelbaum, as joint tenants. They paid no consideration for the stock. The remaining share went to Josephine Melnick. The ownership of the capital stock remained unchanged through December 31, 1947. The Tax Court found that on April 24, 1945, the corporation acquired record title to the Fine Arts Building and portions of the Auditorium Hotel and Theatre, in Chicago. The corporation's actual interest was an undivided one-half interest with beneficial ownership of the other undivided one-half interest in Paul R. Simon or Bessie L. Simon. On May 1, 1945, the corporation conveyed title to the La Salle National Bank, as trustee, with power of direction vested in Mr. Teitelbaum and Mrs. Esther Melnick Teitelbaum. The trust agreement provided that the beneficial interest in the properties was in Tyted Company. On February 27, 1947, the corporation sold to Roosevelt College its beneficial interest in the Auditorium Hotel and Theatre portions of the property, and the trustee conveyed the legal title to the College. The consideration consisted of checks dated February 6, 1947, in the amount of $10,000 and February 27, 1947, in the amount of $142,000 and a promissory note payable to bearer in the face amount of $250,000, which was valued at $200,000 according to the tax return for 1949 to which reference is made below.

On May 1, 1947, the corporation assigned its interest under the trust, which purported to be the entire beneficial interest in the Fine Arts Building: an undivided one-half to Bessie L. Simon and an undivided one-half interest to Mr. Teitelbaum and Mrs. Esther Melnick Teitelbaum.

During 1949, Mr. Teitelbaum received three interest payments of $2,500 each on Roosevelt College's note. He was then negotiating with the College for the sale of the note, which was in fact sold that same year, and for which Mr. Teitelbaum received an additional $190,000. He reported the selling price as $197,500 in the tax return for 1949 [Exh. 23] but reported no interest for that year. He explained in the capital gains schedule that the three $2,500 payments, originally treated as interest, were, on closing the sale, to be treated as principal in accordance with an agreement of seller and purchaser. However, no other evidence of this agreement was introduced. Mr. Teitelbaum testified that the agreement had been evidenced by a letter which was lost among his files. He promised [Tr. 885] to produce the original or a copy of it. It does not appear that it was ever produced. Thus the determination of whether the interest payments were by agreement converted to principal rested on the Tax Court's evaluation of Mr. Teitelbaum's credibility on this point. The Commissioner's investigation had disclosed no knowledge of this agreement on the part of the Roosevelt College authorities. The Tax Court found that the note was sold for $190,000 and that the three earlier payments of $2,500 each did constitute interest payments. That finding is not clearly erroneous.

In 1951, Mr. Teitelbaum acquired the stock of Metropolitan Radio Corporation of Chicago (which operated radio station WMOR) from various persons, including two officials of the Chicago Restaurant Association, at about ten cents on the dollar. On the joint individual partnership income tax return filed by Mr. Teitelbaum and Mrs. Esther Melnick Teitelbaum, the following loss was claimed:

> RADIO STATION W.M.O.R.:
> I advanced the sum of $71,213.18 to discharge the payroll debts, rent, taxes due to the government for Social Security and Withholding taxes of F.M. Radio Station, operated by myself. The corporate name was

merely retained as a legal convenience and the station was never operated as a corporation. No income was received and funds were advanced by myself personally all $71,213.18

The Tax Court found that $22,269.88 of the $71,213.18 claimed by Mr. Teitelbaum represented items which did not constitute expenses of WMOR, and the items totalling $20,901.94 had been previously deducted on tax returns. The Tax Court did conclude that at least $48,289.83 had been advanced by Mr. Teitelbaum to pay expenses of Metropolitan Radio Corporation of Chicago.

In 1952, Metropolitan Radio Corporation of Chicago was the subject of a petition in bankruptcy. On April 18, 1952, Metropolitan was adjudicated bankrupt. The list of claims filed in the bankruptcy included Mr. Teitelbaum's claim for loans in the amount of $71,213.18. However, except for the fact of the bankruptcy in 1952, no evidence of the uncollectibility of the advances made by Mr. Teitelbaum was submitted to the Tax Court. From the evidence adduced before it, the Tax Court could not find that the loss occurred in 1951.

In Mr. Teitelbaum's view he met all conditions to his right to deduct certain travel and hotel expenses which were disallowed by the Commissioner. Mr. Teitelbaum avers that he was conducting two business: a ranch in Indio, California, (on which we have heretofore commented) and a law practice in Chicago, Illinois. He argues that his expenses, evidenced by vouchers, receipts, and air travel tickets, were reasonable and necessary, incurred while away from home, directly connected with his businesses and appropriate to them. The evidence to which he refers included receipts for expenditures made while in Chicago. Mr. Teitelbaum states that he owned no home in Chicago from 1947 until 1952, and during that period he resided at a Chicago hotel.

He did travel to Miami, Florida, where his second wife lived, and to Indio, California, where his first wife and family resided. There is no evidence to indicate any busi

ness conducted in Florida. We agree with the Tax Court that Mr. Teitelbaum did not support the burden of showing that the date ranch was a venture operated in good faith for profit. There is nothing in the evidence to show that Mr. Teitelbaum made these trips for any purpose other than to visit his relatives. We conclude that the Tax Court properly found no deductible travel or hotel expense beyond that already allowed by the Commissioner.

It is not disputed that the burden of proving fraud rested on the Commissioner. Mr. Teitelbaum takes the position that the Tax Court presumed fraud from mere negative evidence. Fraud is a question of fact. We may not set aside the Tax Court's findings of fraud unless we find them unsupported by substantial evidence and clearly erroneous. *Jaeger Motor Car* v. *Commissioner*, 7 Cir., 1960, 284 F. 2d 127, 129. The taxpayer's consistent and substantial understatement of income over a period of several consecutive years, considered in the light of all the attendant circumstances, was clear and convincing evidence of fraud. *Bender* v. *Commissioner*, 7 Cir., 1958, 256 F. 2d 771, 774. The Tax Court found substantial sums which had been distributed to Mr. Teitelbaum, out of the operations of the Douglas and Fine Arts Buildings in Chicago, were not reported as income. Mr. Teitelbaum directed the agency in charge of the buildings to issue letters to him to evidence the amounts which had been paid to him, to his partner, and to the Tyted Company. At his direction, these letters did not reflect amounts which had been disbursed out of the building agency accounts, (on Mr. Teitelbaum's instructions) which were not normally part of the operating expenses of the buildings, and which were reflected on the agency's statements as distribution of income to the owners of the buildings. In reporting net capital gain from the sale of the Douglas Building, Mr. Teitelbaum included an expense item of $200,000 as expenses not theretofore deducted. The evidence adduced before the Tax Court demonstrated that many of the items included in that total had previously been deducted.

The $200,000 item appears on a page of the tax return prepared by Mr. Teitelbaum personally and added to a schedule of cost data on a prior page of the return which had been prepared by Mr. Teitelbaum's attorney. The Tax Court was satisfied after hearing the testimony that Mr. Teitelbaum had prepared the addition to the return with knowledge of its falsity and with intent to evade tax.

We have drawn a few examples at random from a voluminous record which support the Tax Court's finding that the Commissioner established by clear and convincing evidence a pattern of conduct amounting to fraud with intent to evade tax. This conclusion is amply supported by the record without recourse to the additional evidence of Mr. Teitelbaum's criminal fraud convictions.

We have carefully considered all the other issues involved in this case and the various arguments advanced on behalf of Mr. Teitelbaum. It would unduly extend this opinion to no good purpose to comment on each individually. We have found no merit in the petitioner's contentions. The decision of the Tax Court is affirmed.

MAJOR, *C.J.*, concurring in part and dissenting in part.

I concur in and approve of the majority opinion, except as to the item (almost $80,000) expended in the Fine Arts Building for the conversion of electricity from direct current (DC) to alternating current (AC). The Court sustains the Tax Court in its conclusion that this was a capital expenditure rather than "an ordinary and necessary expense paid or incurred during the taxable year in carrying on any trade or business * * *." With this conclusion I do not agree.

I agree that the fact that conversion was required by an ordinance of the City of Chicago is not determinative of the issue. It does, however, remove any doubt but that the expense was necessary. There remains the question as to whether it was ordinary. It has been held that an

expense to be ordinary need not be of frequent occurrence but may occur only once. *Welch* v. *Helvering*, 290 U.S. 111, 114; *Deputy et al.* v. *du Pont*, 308 U.S. 488, 495.

The weakness of the Commissioner's position is demonstrated by his brief. In his statement of facts he relies upon the finding of the Tax Court, "Although the conversion did not increase the value of the building as such, it did affect the amount which a buyer would be willing to pay for the building." I am not able to comprehend how it can be found that the value of the building was not increased and at the same time say that it could be sold for more money. Neither can I accept the argument, made here by the Commissioner, that the conversion increased the market value of the building in face of the finding that its value was not increased. The taxpayer testified that the market value was not increased and his testimony was supported by that of a qualified architect and engineer. If the market value was increased, as now argued, testimony to that effect would have been readily available. None, however, was offered by the Commissioner. Moreover, the fact, if such it be, that a buyer would be willing after conversion to pay more for the building is no indication that the cost was a capital expenditure. The same contention with equal plausibility could be advanced whether the expenditure was for a necessary and ordinary expense or whether it was for a capital improvement.

A reading of the cases reveals the difficulty courts have had in deciding the question under consideration. Each case must depend largely on its own facts. *Jones* v. *Commissioner*, 242 F.2d 616, 620. In that case, the Court quotes from the Board of Tax Appeals as to the distinction between deductible repairs and non-deductible disbursements as follows (page 619):

> "'A repair is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition

> over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use.'"

In the instant case, the expenditure was for the purpose of keeping the property in an operating condition, did not add to its value (according to the finding of the Tax Court), did not appreciably prolong its life and did not make it adaptable to a different use.

Two cases, much relied upon by the government and cited in the majority opinion, are *RKO Theatres, Inc.* v. *United States*, 163 F. Supp. 598, and *Woolrich Woolen Mills* v. *United States*, decided April 19, 1961, by the Court of Appeals for the Third Circuit. The former case, written for the Court of Claims by Justice Reed (retired), reviews many cases and is often cited. In that case, the taxpayer in compliance with law provided new exit facilities and fire escapes from its theatre. The Court sustained the Commissioner's holding that the expenditure was for a capital improvement. In distinguishing cases relied upon by the taxpayer, the Court stated (page 602):

> "The addition and changes were not in any sense a repair or replacement of existing facilities. They were permanent changes designed to make it possible to carry on a business for profit."

In the instant case, the conversion was only the replacement of existing facilities and was not designed to make it possible to carry on a business for profit. That was already being done. On the same page, the Court stated:

> "This was not a repair, 'a substitution of new parts or restoration of certain parts of a given whole,' but a capital improvement made to increase the value of the property for use in the taxpayer's theatre business."

Again, in the instant case, there was only a substitution of new facilities for the old, not an improvement designed to increase the value of the building for the use to which it was put.

The *Woolrich* case is also distinguishable on its facts. There, the expenditure was for a filtration plant, constructed in compliance with a state law, for treatment of waste from a woolen mill. The plant consisted of a building with its contents located approximately one-third of a mile from taxpayer's mill. The Court in holding this to be a capital expenditure distinguished cases relied upon by the taxpayer as follows (page 8, slip opinion):

> "Those cases involved outlays of moneys for alterations of existing structures which, on the facts present in those cases, the Tax Court held to constitute repairs. We are not confronted here with a similar situation."

The situation which did not exist in that case is present here where there was the alteration of an existing structure and the substitution of a new facility for the old which served the same purpose without increasing the value of the building or the taxpayer's income derived therefrom.

I would hold that the conversion expenditure was a necessary and ordinary expense and reverse the Tax Court in that respect.

APPENDIX "B".

August 24, 1961

Decision of U. S. Court of Appeals.

"This cause come on to be heard on the transcript of record from the Tax Court of the United States and was argued by counsel.

On consideration thereof, it is ordered and adjudged by this Court that the Decision of the Tax Court of the United States entered in this cause on May 20, 1960 be and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day."

APPENDIX "C".

United States Court of Appeals

October 3, 1961

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

Certificate of the Clerk of the United States Court of Appeals for the Seventh Circuit.

Dated December 6, 1961

APPENDIX "D".

Exhibit "One" under Rule 18 of United States Court of Appeals photostat of letter of United States Treasury Department filed April 26, 1961 with Clerk of United States Court of Appeals in which

> "upon examination of the partnership, it has been determined that Esther Melnick Teitelbaum has not been a partner in fact since 1945 and all the income from the alleged partnership Teitelbaum & Melnick is taxable to Abraham Teitelbaum. Sec. 61 of the 1954 Internal Revenue Code.

Statement of Examining Officer

Proposed adjustments for year ending 1956.
Signed by Harry Ansell

Internal Revenue Agent
2nd Exhibit "Two" filed April 26, 1961 under Rule 18.

Form # 672

United States Treasury Department
(Revised August, 1956)

to extend period of limitations to June 30, 1958 to examine record of petitioner for year 1949.

Certified Exhibit "3"

Penalties

1st case
$45,028.33 twice
Plus 24,386.46
Sec. 293(b)—$99,931.83.
Sec. 294 (d)(1)(A)—$12,559.04.
and Sec. 394(d)(2)—$11,747.08.

transcript of Typewritten record page 7 as ordered by the United States Court of Appeals.

APPENDIX "E".

Character Witnesses before Chicago Bar Association.

By stipulation of counsel, the Commissioners permitted the respondent's Exhibit #13 to be introduced into evidence in lieu of calling men in public life who would testify as to the character and reputation of respondent.

The first signer, Leo Bartline, is a lawyer and former chairman of the Division of the Grievance Committee of the Chicago Bar Association.

The second signer is Julius L. Sherwin, a lawyer practicing law approximately 30 years and a former Assistant State's Attorney of Cook County. The third signer is William J. McGah, a Master in Chancery of the Superior Court. The fourth signer is a lawyer, Carrol Teller, who has practiced law over forty years. All the following signers are sitting Judges:

Daniel A. Covelli, Judge of Superior Court.
John A. Sbarbaro, Judge of Superior Court.
John J. Lupe, Judge of Superior Court.
Frank M. Padden, Judge of Superior Court.
Norman L. Eiger, Judge Municipal Court.
Julius H. Miner, Judge of the Circuit Court. (Federal Court).
Daniel A. Roberts, Judge of the Circuit Court.

Judge Otto Kerner of the County Court of Cook County voluntarily appeared before the Commissioners on behalf of respondent. He testified he was the United States District Attorney for the Northern District of Illinois, Eastern Division in 1948 to 1954. (At present Judge Kerner is the Governor of the State of Illinois). That he received a delegation of all the Directors of the Chicago Restaurant Association about August 1, 1952 and that these directors are all prominent men in Chicago and the purpose of the visit was to be informed whether or not their attorney, respondent herein, would be indicted after

he paid in full all the taxes, penalties and interests; that the Chicago Restaurant Association was about to lend respondent $35,000 to pay the balance due on his income taxes; that he told this delegation that respondent would not be indicted because the law cited in the guide for internal revenue agents and in Balter on Frauds under Federal Tax Law states that before any assessment notice is given any taxpayer, all criminal phases of a tax case are disposed; that in reliance upon this law he advised the Directors it would be safe to lend their counsel the money to pay the balance due in income taxes. He further stated that he was chagrined when the order for indictment came on January 21, 1953, one day after a new administration came in power; that shortly thereafter he sent his first Assistant U. S. Attorney to Washington, D. C., with a recommendation to *nolle prosse* this tax case against respondent.

APPENDIX "F".

Offer of Proof refused by Tax Court.

(Petitioner was Respondent)

First Offer of Proof.

Proposed witness, P. J. Boylan, subpoened as a witness for respondent, was denied the right to testify on the ground that his testimony goes behind the record of a conviction. Respondent contended that this testimony was relevant and admissible under the rules of evidence to refute the charge of moral turpitude, and to further prove respondent's innocence of any crime.

P. J. Boylan, if permitted, would testify as follows:

That his name is Percy J. Boylan, residing at 7314 South Crandon Avenue, in Chicago, Illinois; that he is 60 years of age and worked for the U. S. Treasury Department for over 25 years and that he is now retired; that he was the Internal Revenue Agent in charge of the income tax investigation of respondent for the years 1946-1947; that he first started investigation of all the books and records of respondent in 1947, which lasted to 1951; and that he found all the records and accounts of respondent to be true and correct; that he also examined and had examined under his direction the books and records of the Tyted Co., a corporation, and found the books and records were kept by a reputable real estate firm of Willoughby & Co., and that he found some mistakes which were the usual and customary ones made by thousands of corporations and individuals; that there was no wilful attempt on Taxpayer's part to evade the payment of any tax; that his office was prepared to settle the case on a 5% negligence penalty tax basis.

That in the early part of 1951 he was ordered by his superiors to close the case and forward same for prosecution. The attempted shakedown of Taxpayer and the King Committee hearings are part of the record.

That in December, 1951, Taxpayer received an assessment tax for 1946 and 1947 which he advised Taxpayer to pay, and he further told Taxpayer that the tax manual provided that before his office sends out an assessment, all criminal phases of a tax case are already settled.

That the indictment in 53 CR 36 was returned on January 21, 1953, the day after President Eisenhower was inaugurated President, and one day before Mr. Brownell was confirmed by the Senate as Attorney General of the United States; that this indictment was voted in haste without the testimony of this witness; and that the Grand Jury was not informed that all the taxes, penalties and interest were fully paid for the years involved; that this indictment was a complete miscarriage of justice; that the then District Attorney had written a memorandum to Justice Department refusing to indict respondent, and that in his opinion Taxpayer did not commit any crime; that witness knows that there was no examination of any books or records of Taxpayer for the years 1950 or 1951, which is the basis for the second indictment; that he believes respondent is completely innocent of the charges in both indictments; that both indictments are malicious and brought in bad faith; that he firmly believes Mr. Teitelbaum to be innocent and a victim of persecution.

SECOND OFFER OF PROOF.

Joseph Struett, a proposed witness for respondent, was denied the right to testify after being subpoenaed for respondent on the ground that his testimony would challenge the conviction in the case. However, respondent contends this witness would prove that the indictment was originated in bad faith and maliciously, as a result of a sinister plot, and that there was no moral turpitude in this case.

Joseph Struitt, if permitted, would testify that he is an attorney-at-law for over 30 years; that he was an Assistant U. S. Attorney in 1929-1932, and that in 1950 to 1953 he was the Chief Regional Counsel of the U. S.

Treasury Dept. in charge of fraud violations; that in the early part of 1951 he received the file of Abraham Teitelbaum, an attorney-at-law whom he knew for over 20 years; that he knew respondent to have a fine reputation as a lawyer, and that his integrity was above reproach; that the file had on its face the letter "R" for racketeer, which he seriously contested and refused to go along with said classification; that he reported to his superiors his objections; that a Mr. Whyte, a Treasury attorney, held a hearing in this case involving the taxable years of 1946 and 1947 and he found after hearings that taxpayer committed no fraud; that everything that taxpayer did was discernible by a mere cursory examination of the tax returns filed by respondent; that he was ordered to close his files in 1951 and forward same to Washington; that he knows of the King Committee reports in this case and of the attempted shakedown of respondent; that the indictment 53 CR 36 has its origin in bad faith and for bad motives, and in furtherance of a scheme to extort money from respondent; that this case is just one example which resulted in a complete reform movement in the Treasury Department; that he believes in his opinion respondent to be innocent and that no moral turpitude was involved.

APPENDIX "G".

Tax Court's Judicial
Notice of King Proceedings.

INTERNAL REVENUE INVESTIGATION.

Hearings Before a Subcommittee of the Committee on
Ways and Means
House of Representatives
Eighty-Second Congress.

Testimony of Richard C. Schwartz, Assistant Head of the Penal Division of the Bureau of Internal Revenue.

On page 1523—On Cross-Examination: (Congressional Record).

Mr. DeWind (Chief Counsel of Committee). Would that indicate that at that point you were not satisfied that the case was yet in shape to recommend prosecution?

Mr. Schwartz. Yes, sir. I was satisfied at that point that the racketeer classification should be cleared up and that the merits of the case should be further looked into with respect to items which I intended to advise Mr. Struett by memorandum and at that time told Mr. Oliphant briefly what those were.

• • •

Mr. Schwartz. Briefly I was concerned with respect to certain things which were shown on the face of the returns which were filed, which indicated to me that perhaps as to those items there had been no concealment because the returns had been received in the collector's office.

On page 1524.

Mr. Schwartz. I advised him (Mr. Struett) I wanted a further investigation, a further supplemental report from the Intelligence Unit relative to the investigation of Teitelbaum's activities as distinguished from rumor that he was engaged in illegal activities within the racketeer classification.

Mr. DeWind. Did you indicate that on the basis of the file as it was that this could not be a racketeer case?

Mr. Schwartz. Yes, sir, I did.

• • •

Mr. Schwartz. This was the only instance in which I had written a memorandum that had gone in the mails and had been called back.

Congressman Kean. He (Oliphant) would therefore seem to be extraordinarily interested in getting back those papers that you sent.

Mr. Schwartz. Yes, sir. I construed it as a cancellation of my memorandum, and that is what I did.

On page 1798. (Testimony of Charles Oliphant, former Chief Counsel for Bureau of Internal Revenue.)

"Up to the time within the past two weeks when Grunewald suggested to me that I not mention to this Committee his inquiry about the Teitelbaum case, • • •."

On page 1799.

Mr. DeWind. Then do I understand that later that day after you had inquired from Mr. Schwartz concerning the cases you called Mr. Grunewald and gave him the information?

Mr. Oliphant. I called him and gave him the information that they probably would not be called racketeers.

Mr. DeWind. In giving that information to Mr. Grunewald, was that a violation of Treasury policy against disclosing confidential information to unauthorized persons?

Mr. Oliphant. My own belief would be that it would not be.

On page 1808.

Mr. DeWind. Why did you decide 2 days later, after you had been advised there was not a sufficient case for prosecution, yet the case was sent back for further study, to call the files back?

• • •

Mr. Oliphant. I don't recall.

On page 1809.

Mr. Kean. Was that date when Mr. Grunewald made that request to you before the hearing here in public in which the Teitelbaum matter was brought up?

Mr. Oliphant. That was the night of the day before I resigned.

On page 1814.

Mr. Oliphant. Outside interference?

Mr. DeWind. That was the charge that was made—that the case was expedited for prosecution because of interference from the outside. In view of what happened after Mr. Grunewald called you about the case, is there any explanation or statement of reason you would like to give concerning your reasons for pulling the case back from the transmittal to Chicago?

Mr. Oliphant. I never heard of the two names until Mr. Grunewald made the casual inquiry.